

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION**

TERA A. McMILLAN,)
)
)
Plaintiff,) **Case No: 2:07:CV-01-WKW**
)
)
vs.)
)
ALABAMA DEPARTMENT OF)
YOUTH SERVICES and)
MICHAEL J. HARDY,)
)
Defendants.)

**DEFENDANT ALABAMA DEPARTMENT OF YOUTH SERVICES' RESPONSE TO
MOTION TO QUASH SUBPOENA**

COMES NOW the Defendant Alabama Department of Youth Services (“DYS”), and responds to Dr. John R. Langlow’s Motion to Quash Subpoena. (Doc. 52). DYS requests that the Court enter an order enforcing the subpoena. In support whereof DYS submits the following:

1. **Federal Common Law Applies.** In applying this rule, the question whether state law or federal common law applies must be determined. “In civil actions and proceedings,” where evidence is offered “with respect to an element of a claim or defense as to which State law supplies the rule of decision,” the existence and nature of the privilege “shall be determined in accordance with state law.” (See F.R.Evid. 501). The plaintiff has filed a complaint citing Title VII and 42 U.S.C. 1983; thus the federal law applies.

2. **If the Privilege Exists the Plaintiff Waived It.** Although the psychotherapist - patient privilege exists, it is not absolute. When a party puts there

physical condition in issue, the question obviously arises whether the privilege has been waived.

See Doe v. Dairy, 456 F.3d 704, 718 (7th Cir.2006); *Schoffstall v. Henderson*, 223 F.3d 818, (8th Cir.2000). In this case there can be no doubt the Plaintiff waived the privilege. The Plaintiff testified in her deposition as follows:

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16 . . . And you are saying in this lawsuit that it makes you so
17 miserable, that you suffered so greatly --
18 A Yes, I have.
19 Q -- that you are entitled to significant money
20 damages because of that?
21 A I have suffered greatly, sir.
22 Q And you are claiming that you want to be
23 compensated in money for that suffering? I understand

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1 that correctly; right?
2 A Yes, sir. I have suffered greatly mentally
3 and physically.

(Exhibit A, McMillan Dep. P. 121-122).

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19 Q That's it? You are going to go tell the jury
20 that all you want out of the lawsuit is for your
21 co-workers to be told that you told the truth and that
22 will solve everything?
23A I think I need some more of that psychological

The plaintiff further testified as follows:

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1 counseling because I can't afford it.
2 Q You need psychological counseling for what?
3 A For the mental abuse that I have experienced
4 while working here.
5 Q How much is that?
6 A I don't know.
7 Q Have you had to pay for any psychological
8 counseling out of your pocket?

9 A I had to pay the co-pay, I think.

10 Q How much?

11 A I don't know. I don't remember.

12 Q A ballpark figure?

13 A I know the department recently set up for us

14 to have three sessions with a psychologist.

15 Q So I think you know what I am trying to ask

16 you.

17 What do you want out of this case? You are asking

18 for damages. What do you want?

19 A Compensation

20 Q Well, how much? What do you want? What do

21 you intend to ask for? What do you think it is worth?

22 A It is worth a whole lot more than what you are

23 willing to give me.

(Exhibit A, McMillan Dep. P. 194-195)

WHEREFORE, the Defendant respectfully request that this Honorable Court deny the Dr. Langlow's Motion to Quash Subpoena in this case and enter an order enforcing the subpoena for the plaintiff's medical records.

Respectfully submitted this 11th day of February 2008,

s/ T. Dudley Perry Jr.

T. Dudley Perry, Jr.

Bar Number: 3985-R67T

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s/Sancha E. Teele

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of February, 2008, I electronically filed the foregoing, DEFENDANT ALABAMA DEPARTMENT OF YOUTH SERVICES' RESPONSE TO MOTION TO QUASH SUBPOENA with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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s/ T. Dudley Perry Jr.
T. Dudley Perry, Jr.
Bar Number: 3985-R67T
Deputy Attorney General
Attorney for the Defendants

MCMILLAN
v.
DYS AND
HARDY

EXHIBIT A

TERA MCMILLIAN - 1 22 2008

1

1 IN THE UNITED STATES DISTRICT COURT FOR
2 THE MIDDLE DISTRICT OF ALABAMA
3 NORTHERN DIVISION

4

5 TERA A. MCMILLIAN)

6 Plaintiff,)

7)

8 VS.) CASE NO.: 2:07-CV-01-WKW

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10 STATE OF ALABAMA DEPARTMENT)

11 OF YOUTH SERVICES, and)

12 MICHAEL HARDY,)

13 Defendants.)

14 The deposition of TERA MCMILLIAN, taken by the
15 Defendants, pursuant to the Federal Rules of Civil
16 Procedure, before Kimberly B. Faucette, ACCR-309,
17 Certified Court Reporter and Notary Public in and for the
18 State of Alabama at Large, at the Alabama Department of
19 Youth Services, Mt. Meigs, Alabama, on the 15th day of
20 January, 2008, at 10:30 a.m., pursuant to notice, and
21 continued on the 22nd day of January, 2008, at 9:00 a.m.,
22 pursuant to notice.

23 * * * *

EXHIBIT
Defendant
A

TERA MCMILLIAN - 1/22/2008

2

1 APPEARANCES:

2

3 FOR THE PLAINTIFF: FOR DEFENDANT MICHAEL HARDY:

4 MR. JIMMY JACOBS MR. JAMES E. WILSON

5 Attorney at Law Attorney at Law

6 Montgomery, Alabama Montgomery, Alabama

7

8 FOR DEFENDANT ALABAMA DYS:

9 MR. T. DUDLEY PERRY, JR.

10 MS. SACHA TEELE

11 Attorneys at Law

12 Mt. Meigs, Alabama

13

14 ALSO PRESENT:

15 MR. GERRY LOVE

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23

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1 Q I am actually not sure. You don't remember?

2 A No, sir.

3 Q What do you want in this case?

4 A Vindication.

5 Q What does that mean? I need specifics.

6 A I want it to be known that I was telling the
7 truth; I was not lying.

8 Q You don't think that Michael Hardy having been
9 fired based on what you said and personnel upholding
10 that?

11 A No, sir. Because the people back there seem
12 to think he and I were having a relationship.

13 Q So you want us to go tell everybody that you
14 and Michael Hardy didn't have a relationship?

15 A If you would like to do that, that would be
16 good.

17 Q Anything else you want out of this lawsuit?

18 A Like what do you mean?

19 Q That's it? You are going to go tell the jury
20 that all you want out of the lawsuit is for your
21 co-workers to be told that you told the truth and that
22 will solve everything?

23 A I think I need some more of that psychological

TERA MCMILLIAN - 1/22/2008

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8 counseling out of your pocket?

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21 you intend to ask for? What do you think it is worth?

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23 willing to give me.

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1 Q You think so?

2 A He had a lot of friends.

3 Q Do you?

4 A Do I have a lot of friends out here?

5 I wouldn't say friends, but I am friendly with
6 people.

7 Q I am going to jump over to another subject.

8 There is something that I am puzzled about. If I
9 understand what you just said, you are friendly to
10 people?

11 A I am friendly with people, yes.

12 Q But what you are saying in this lawsuit is
13 that people aren't friendly to you: right?

14 A Some of them.

15 Q Right. The people that we have talked about.
16 And you are saying in this lawsuit that it makes you so
17 miserable, that you suffered so greatly --

18 A Yes, I have.

19 Q -- that you are entitled to significant money
20 damages because of that?

21 A I have suffered greatly, sir.

22 Q And you are claiming that you want to be
23 compensated in money for that suffering? I understand

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122

1 that correctly; right?

2 A Yes, sir. I have suffered greatly mentally
3 and physically.

4 Q But at the same time, every one of those
5 people, they work here on this campus. You do know that
6 you have had the opportunity, if you wanted, just say
7 the word, and you could transfer, if you want to?

8 A Transfer, what do you mean?

9 Q You could leave this campus if you want to and
10 go work at Autauga, for example? You know that?

11 A Why would I want to go work at Autauga?

12 Q I didn't ask you that. On one hand, it is
13 your testimony that the people here mistreat you so
14 badly that you have had to have all kinds of treatment
15 and therapy and everything else, and now you want a lot
16 of money, and you also know, on the other hand, that you
17 have the opportunity, if you want, to go work somewhere
18 else? That is your choice?

19 A I have not done anything to anyone.

20 Q No. No. You understand that, don't you?

21 A I do understand that.

22 Q Right. I really am curious about that. And I
23 have got to tell you, unless I was trying to just figure